OUTER HOUSE, COURT OF SESSION

[2021] CSOH 65

P925/20

OPINION OF LORD FAIRLEY

In the petition of

CALUM STEELE

Petitioner

for

JUDICIAL REVIEW

Petitioner: Dean of Faculty, Young; MacRoberts LLP
Respondent: Ross QC, Blair; Clyde & Co

22 June 2021

Introduction

[1] The petitioner is the General Secretary of the Scottish Police Federation ("the SPF"). The SPF is a body established under section 59 of the Police Act 1996 for the purpose of representing members of the police force in Scotland in all matters affecting their welfare and efficiency.

[2] The petitioner is also a police constable with the Police Service of Scotland. Since his appointment as General Secretary of the SPF in around 2009 the petitioner has not undertaken any operational police duties. He nevertheless remains subject, in his capacity

as a police constable, to the misconduct procedures contained within the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) ("the 2014 Regulations").

[3] The respondent is the Deputy Chief Constable of the Police Service of Scotland. The petitioner seeks declarator that a decision made on behalf of the respondent to institute and maintain misconduct proceedings against him was unlawful at common law and incompatible with his right to freedom of expression in terms of Article 10 of the European Convention on Human Rights ("ECHR"). He seeks reduction of a particular decision taken by the respondent on 22 September 2020, on which date a Misconduct Form under Regulation 15 of the 2014 Regulations was issued to him.

"Misconduct" by police officers

[4] Issues of alleged misconduct by police officers are regulated principally by the 2014 Regulations. In terms of Regulation 2 "misconduct" is defined as "conduct which amounts to a breach of the Standards of Professional Behaviour". The "Standards of Professional Behaviour" are set out in Schedule 1. Under the heading "Discreditable conduct", it is provided that:

> "Constables behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty."

[5] Police Scotland's Guidance relating to the operation of the 2014 Regulations states *inter alia* (at paragraph 3.10.3):

> "Discredit can be brought on the police service by an act itself or because public confidence in the police is undermined. In general, it should be the actual underlying conduct of the police officer that is considered under the misconduct procedures, whether the conduct occurred on or off duty."

[6] Specific Guidance is also given to police officers about their use of social media. A document entitled "Online Safety Guidance for Police Officers and Police Staff" states that constables must:

> "when interacting online or using any social media channel ... be aware and consider the impact their actions might have, not only on themselves, but on Police Scotland."

Constables are advised carefully to manage which images / videos they upload, and are cautioned that:

> "any images should not reflect badly on Police Scotland – or you as Police Scotland personnel"

Police Scotland Standard Operating Procedure in relation to e-mail and internet security states *inter alia*:

> "in terms of professional advice and guidance, staff should consider the following [...] staff must not publish or exhibit anything textual or photographic that would be considered disrespectful to others and detract from the dignity of their public office."
>
> and
>
> "Police Scotland recognise that constables have a right to use social media. Provided they adhere to the statutory standards of professional behaviour and behave in a manner that does not discredit the Police Service or undermine public confidence in it, the use of social media is consistent with holding public office and with the oath taken by all constables."

Misconduct procedures

[7] Regulations 10 to 14 of the 2014 Regulations set out the procedures for misconduct investigations and, where appropriate, referrals to misconduct proceedings. Where an allegation of misconduct by a police officer comes to the attention of the Deputy Chief Constable, she must assess whether the conduct which is the subject of that allegation would, if proved, amount to misconduct and, if so, whether it is to be investigated (Regulation 10(2)-(4)). If the allegation is to be investigated, the Deputy Chief Constable

must appoint an investigator who must be of a higher rank than the constable being investigated (Regulation 10(5)).

[8] The investigative process begins with the service of a Notice of Investigation by the investigator (Regulation 11). Where the constable being investigated wishes to make representations orally, a Misconduct Interview must be held (Regulation 12). At the conclusion of the investigation stage, the investigator must prepare and submit a written report to the Deputy Chief Constable (Regulation 13). The Report must include a statement of the investigator's opinion as to "whether the misconduct allegation should be referred to misconduct proceedings" (Regulation 13(2)(b)). On receipt of the investigator's Report, it is for the Deputy Chief Constable to determine whether or not the constable "has a case to answer" (Regulation 14(1)). If the Deputy Chief Constable decides that there is a case to answer, she "must refer the misconduct allegation to a misconduct meeting" (Regulation 14(2)) and "must send a misconduct form to the constable" (Regulation 15(2)) .

Relevant factual background

[9] On 3 May 2015 a member of the public, Mr Sheku Bayoh, died in police custody shortly after being arrested in Kirkcaldy. Mr Bayoh's death was the subject of substantial media comment as well as debate *inter alia* on social media. Some of this comment and debate included public calls for the individual police officers involved in the incident to be prosecuted.

[10] On 11 November 2019 the Lord Advocate publicly announced that the police officers who were involved in the incident which resulted in the death of Mr Bayoh would not face criminal prosecution. The announcement of that decision was again widely reported on that day. It was also the subject of comment and discussion on social media.

[11] At 12.46pm on 11 November 2019, the petitioner posted on his personal account with the microblogging and social networking service Twitter in the following terms:

> "Today's announcement that there is no basis to support the bringing of any criminal charge against any police officer following the death of Sheku Bayoh is completely unsurprising & shows that no amount of innuendo will ever be a match for evidence."

[12] On the same day a solicitor who represented members of Mr Bayoh's family posted on Twitter what bore to be a quotation from a third party. It read:

> "This decision not to prosecute the police at an individual or corporate level is deeply disappointing & is based on a fundamentally flawed investigation. A public inquiry is now needed."

[13] At 4.18pm, the petitioner responded to that post, again using his personal Twitter account, stating:

> "Thankfully wholly independent decisions to prosecute or otherwise are made on the basis of evidence and not innuendo, speculation, or smear."

[14] A further post was then made by the solicitor for Mr Bayoh's family which stated:

> "Sheku Bayoh died in police custody 3 May 2015, up to 50 separate injuries, broken rib, lacerations, with over 50 stones bodyweight on him, cuffed, ankle & leg cuffs, restrained by up to 9 officers – today he was described to his family as being like a 'toddler having a tantrum!'"

The post included a picture of members of Mr Bayoh's family and an image taken from a newspaper article. The latter was headed "Sheku: The Injuries" and bore to be a body map showing, *inter alia*, the sites of various injuries which had been found on Mr Bayoh's body at post-mortem examination.

[15] The petitioner responded to that post at 4.53pm in the following terms:

> "Anyone looking at 'the injuries' image might want to read this alongside it and consider if something relevant has been missed in the innuendo laden accompanying report."

The petitioner's post contained a link to an online newspaper article in a different newspaper about a fight that Mr Bayoh was alleged to have had with a third party shortly before his arrest by police officers.

[16] The petitioner posted again on Twitter at 5.06pm. His post read:

> "Lots of people who follow me also follow [the Bayoh family's solicitor] (well we are both interesting chaps) but whilst many of you will see the image on the left [the body map]…you won't be shown the somewhat more than relevant story on the right."

The "story on the right" was again a link to the newspaper article about the alleged earlier fight. Another user of Twitter, a political journalist, responded to the petitioner's 5.06pm post by posting:

> "What an appalling tweet. The article… has no bearing on whether or not the police used appropriate force. Drawing attention to it could well be seen as simply an attempt to damage the character of a dead man and remove focus from the police."

[17] At 6.17pm, the petitioner responded on Twitter to the post by the journalist, saying:

> "Or an attempt to bring much needed context to a much used image that otherwise lacks it – or maybe the earlier well reported fight was like this and everyone else is wrong?"

The 6.17pm post included a graphics interchange format image (also known colloquially as a "GIF") showing one man lightly tapping another man on the cheek before running away. The GIF image was apparently a clip taken from a comedy film called "Napoleon Dynamite".

[18] The petitioner's 6.17pm post drew a number of negative comments from other users of Twitter. Some of these were personally abusive of the petitioner. Several referred either to his status as a police officer or to his position as General Secretary of the SPF. Several called for his resignation. One stated: "This is sick". Another asked rhetorically: "Is this

really a topic for gifs?". Another stated: "Your conduct is way below that expected of a police officer."

The Regulation 10-14 proceedings

[19] Neither the Petition nor the Answers for the respondent identifies when, by whom or in what terms an "allegation of misconduct" was made against the petitioner. The discussion before me at the full hearing proceeded on the basis, however, that such an allegation had indeed been made and that it had come to the attention of the Deputy Chief Constable such as to engage Regulation 10 of the 2014 Regulations.

[20] In particular, the petitioner avers that on or around 2 December 2019, an investigating officer was appointed by the respondent under and in terms of Regulation 10(4) of the 2014 Regulations "to investigate a potential allegation of misconduct" (*sic*) against the petitioner in respect of the post by him at 6.17pm on 11 November 2019. The respondent admits that averment.

[21] In due course, the investigating officer reported to the respondent in terms of Regulation 13 of the 2014 Regulations. So far as material to this Petition, the opinion and relative reasons of the investigating officer in terms of Regulation 13 stated *inter alia*:

> "The Police Service of Scotland (Conduct) Regulations 2014 underpin the Standards of Professional behaviour and set out the high standards the service and the public expect of police officers in Scotland. Failure to meet these standards may undermine the important work of the police service and public confidence in it. Even when off duty, police officers should not behave in a manner that discredits the police service or undermines public confidence. Maintaining public confidence in the police service is a legitimate aim not just for reputational reasons but also to protect public safety and prevent crime and disorder.
>
> In arriving at this opinion, I am satisfied that the subject officer posted the message on a Twitter account which can be viewed by anyone and from reading of the Twitter account of the subject officer it can be inferred by any reasonable person that he is a serving police officer. I am also satisfied that the posting of this message was

commented on by other users as being inappropriate considering the post held by the subject officer.

I have taken account of the public nature of the conversation and thus the possibility of a large number of Twitter users who may have viewed the post.

The alleged conduct of the subject officer, in this case discreditable conduct by posting a GIF in the circumstances outlined above, if proven, falls short of the standards expected of a constable as laid out in the Police Service of Scotland (Conduct) Regulations 2014. The death of Sheku Bayoh occurred following his arrest by police officers and there have been serious allegations made against those officers. It is the Investigating Officer's opinion, considering the whole circumstances alleged, and notwithstanding the subject officer's role in representing Scottish Police Federation members, that the general public would expect Police Scotland to fully examine the conduct of the subject officer and that failure to do so would discredit Police Scotland or undermine public confidence in it.

In these circumstances the misconduct proceedings are necessary to achieve the legitimate aims of maintaining public confidence in the police service to achieve the aims of public safety and preventing crime and disorder.

The aim of maintaining public confidence to achieve the objectives of public safety and preventing crime is sufficiently important to justify interference with the subject officer's right to freedom of expression. The misconduct proceedings are connected to these objectives because for the public to feel safe and report criminal activity there needs to be public confidence in the Police Service. The importance of protecting public safety and preventing crime by maintaining public confidence in the Police Service outweighs the interference in the constable's right to freedom of expression by initiating and pursuing misconduct proceedings in the circumstances of this case.

There is no less intrusive measure which would achieve these aims. Improvement action would not be appropriate in this case because the subject officer does not accept that he acted in an inappropriate manner by posting to Twitter, a message which included a video clip (in reference to the alleged fight reported in the media between Sheku Bayoh and another individual which he referred to as 'the earlier well reported fight') of approximately 3 seconds' duration from the 2004 comedy film 'Napoleon Dynamite'. Two of the characters are the titular Napoleon Dynamite and his brother Kip Dynamite. The video clip apparently shows Napoleon striking Kip on the face with Napoleon's left hand to Kip's right cheek. An otherwise unknowing person viewing the footage would reasonably take it not to be a real fight. His conduct on (*sic*) doing so has discredited the Police Service…

For the reasons set out above I conclude that the subject officer has a case to answer in terms of the misconduct allegation.

> I have taken account of the response submitted by the subject officer who believes that the allegation is baseless and has shown no acceptance that his conduct has fallen below the standards expected or that he has demonstrated a commitment to improve his conduct in the future and I therefore form the opinion that it is necessary and proportionate for this misconduct allegation to be referred to misconduct proceedings."

[22] On 15 September 2020, a Chief Inspector of Police Scotland, acting under delegated authority from the respondent in terms of Regulation 5(2) of the 2014 Regulations, having considered the investigating officer's report and relative opinion, determined that the petitioner had a case to answer in respect of misconduct and referred the matter to a misconduct meeting in terms of Regulation 14 of the 2014 Regulations. The conclusion of the Chief Inspector about his basis for concluding that there was a case to answer was in the following terms:

> "Having read the Investigator's report, and in respect of the amended allegation as recommended by the Investigating Officer, I am satisfied that if proven the actions of the subject officer would amount to Misconduct and therefore this matter is referred to a Misconduct meeting, which should be heard by an independent chair. Given the position of the subject officer, it may considered (*sic*) that the independent chair should be sourced from outwith the Federated ranks. I have also considered whether the matter should be dealt with through immediate improvement action, however, having reflected on the sensitivity of the situation to which the allegation refers and coupled with the information from the Investigating Officer's Report that the subject officer does not appear to accept that the alleged conduct is misconduct, I do not consider this to be a viable option."

[23] On 22 September 2020 the petitioner was notified of the Regulation 14 determination by service on him of a Misconduct Form in terms of Regulation 15 of the 2014 Regulations and relative supporting documents. The Regulation 15 allegation was framed as follows:

> "Between 11 and 12 November 2019 at [*an address in*], Glasgow or elsewhere, you acted in an inappropriate manner by posting to Twitter, in reference to an alleged fight reported in the media between Sheku Bayoh and another individual, which you referred to as 'the earlier well reported fight', a video clip of approximately 3 seconds' duration from the 2004 comedy film 'Napoleon Dynamite'. Two of the characters are the titular Napoleon Dynamite and his brother Kip Dynamite. The video clip apparently shows Napoleon striking Kip on the face with Napoleon's left

> hand to Kip's right cheek. An otherwise unknowing person viewing the footage would reasonably take it not to be a real fight. Your conduct in posting this video clip and linking it to the death of Sheku Bayoh has discredited the Police Service."

Reference was made to the definition of "Discreditable conduct" in the Standards of Professional Behaviour at Schedule 1 to the Regulations.

[24] A misconduct meeting was due to be held on 24 November 2020, but was suspended following the raising of these proceedings for judicial review.

Submissions

Petitioner

[25] For the petitioner, the Dean of Faculty began by explaining that two arguments of which notice had been given in the petition – relating respectively to procedural fairness and Article 11 ECHR – were no longer insisted upon. In moving me to grant the orders sought in paragraph 4 of the petition, he advanced arguments only in terms of Article 10 of the Convention (freedom of expression) and irrationality / absence of reasons at common law. By way of response to a point taken by the respondent about prematurity, he also addressed the issue of whether or not an effective alternative remedy was available.

[26] In relation to Article 10, no issue was taken by the petitioner with the proposition that his status as a police officer imposed some restrictions upon his Article 10 right to free expression. Equally, however, the respondent did not suggest that the petitioner enjoyed no such right. The Article 10 right encompassed not only what was said, but the manner or form in which it was said (*Gaunt* v *United Kingdom* (2016) 63 EHRR SE 15, at paragraph 47) unless the form of expression amounted to no more than "wanton denigration" – for example where the sole intent of the statement made was to insult (*Uj* v *Hungary* (2016) 62 EHRR 30, at paragraph 20).

[27] In its Answers and relative Note of Argument, the respondent sought to argue that the institution of misconduct proceedings for the petitioner's use of the GIF did not of itself even constitute an interference with the Article 10 right. That argument was wrong. Being made subject to misconduct proceedings is, of itself, capable of having a "chilling effect" upon the exercise of free expression (*Akçam* v *Turkey* (2016) 62 EHRR 12, at paragraphs 67-68 and 72-75; *Wille* v *Liechtenstein* (2000) 30 EHRR 558, at paragraph 50; *Kudeshkina* v *Russia* (2011) 52 EHRR 37, at paragraph 99; *R (On the application of Miller)* v *College of Policing* [2020] EWHC 225; [2020] HRLR 10, at paragraphs 254 to 261; and *Steur* v *Netherlands* (2004) 39 EHRR 33). The deterrent effect of making the petitioner subject to misconduct proceedings was thus an interference with the Article 10 right, irrespective of the final outcome of those proceedings. The real issue in this case is whether or not the respondent is able to justify the interference in terms of the Article 10(2) qualifications as being "prescribed by law and… necessary in a democratic society". Whilst the burden of establishing the necessity of the interference was on the respondent, in this case the respondent had not engaged with that issue at all. Instead, the respondent focussed entirely on the question of whether or not there was interference.

[28] In *Ahmed and others* v *United Kingdom* (2000) 29 EHRR 1, the Strasbourg Court had summarised the basic principles for determining whether or not an interference with the Article 10 right was "necessary in a democratic society". It was recognised in *Ahmed* that freedom of expression constitutes one of the essential foundations of a democratic society and applies as much to ideas that are favourably received as to those that offend, shock or disturb. The adjective "necessary" relates to the existence of a "pressing social need". Whilst states enjoy a margin of appreciation in assessing whether or not such a need exists, the interference must be "proportionate to the legitimate aim pursued" and supported by

reasons which are "relevant and sufficient". These principles apply to civil servants who enjoy the protection of Article 10. It is nevertheless legitimate for states to impose a duty of discretion on civil servants on account of their status. In determining whether a fair balance has been struck, the "duties and responsibilities" of civil servants assume a special significance which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the aim (*Ahmed*, at paragraph 70).

[29] In this case, the respondent did not explain why institution and maintenance of misconduct proceedings against the petitioner was necessary in a democratic society and proportionate. There was no suggestion that the GIF was shocking or offensive. Whilst it was accepted that the issue would be more difficult if the GIF was mocking the death of Mr Bayoh, no reasonable reader of the Tweet could reach such a conclusion. The Tweet was confined to the narrow issue of the cause (or causes) of the injuries said to have been found on Mr Bayoh post-mortem. The Tweet and the GIF were posted in relation to a clear matter of public interest and in defence of members of the SPF who were under attack on social media by the Bayoh family lawyer. Whilst the lawyer was entitled to say what he said, so too was the petitioner entitled to respond as he had done in defence of SPF members. The GIF was inoffensive and relevant only to the issue of how Mr Bayoh had sustained the injuries which were identified on the body map. It was for the respondent to justify the interference as necessary and proportionate in terms of Article 10(2), but she had failed to do so.

[30] Turning to the common law arguments of irrationality and insufficiency of reasons, the Dean of Faculty's submissions were succinct and direct. On no possible view of matters could the use of the GIF ever be thought to amount to potential misconduct. There was

nothing about the posting of the GIF that warranted investigation. It was not arguable that the use of the GIF might be said to discredit the police service or undermine public confidence in it. The petitioner's use of the GIF was not a rational basis for the institution or maintenance of misconduct proceedings against him, and nowhere in the Report of the Investigating Officer, the Regulation 14 determination or the Regulation 15 notice was any adequate explanation given as to why it was.

[31] Finally, and in anticipation of a submission by the respondent that the petitioner had not exhausted other remedies and was thus premature in this application for judicial review, the Dean of Faculty submitted that such an argument made no sense. If the petitioner's position about the "chilling effect" of misconduct proceedings was accepted, it would be very odd if the only forum in which that point could be taken by him was the very misconduct proceedings the legality of which he sought to challenge. The petitioner was entitled to an effective remedy (*McGeoch* v *Scottish Legal Aid Board* 2013 SLT 183, at paragraph [76]; *R (On the application of Redgrave* v *Metropolitan Police Commissioner* [2002] EWHC 1074 (Admin), at paragraph [15]; *C* v *Chief Constable of The Police Service of Scotland* 2018 SLT 1275, at paragraphs [13], [14] and [16]). If the petitioner's submissions about Article 10 and irrationality are correct, the misconduct proceedings are unlawful and thus subject to the supervisory jurisdiction of the Court of Session.

Respondent

[32] For the respondent, Senior Counsel invited me to refuse the petition. Logically, the first issue was whether or not the petitioner had an alternative remedy which had not been exhausted. On that issue, and under reference to *MIAB* v *Secretary of State for the Home Department* 2016 SC 871, at paragraph 73, Senior Counsel submitted that there were no

exceptional circumstances here which would prevent any of the legal issues raised by the petitioner in this petition from being considered at the misconduct meeting convened by the Regulation 15 notice. To the extent that observations in *C* v *Chief Constable of The Police Service of Scotland* might suggest otherwise, that case was distinguishable due to the particular issue under discussion, which had related to the admissibility of evidence and Article 8 rights. The real issue of contention here was whether or not the conduct of the petitioner amounted to misconduct in the form of discreditable conduct. The appropriate procedural route to resolve that issue was through the procedure mandated by the 2014 Regulations. That procedure could properly take into account the right conferred by Article 10 in answering the question before it. The availability of that alternative remedy was a complete answer to the petition.

[33] If the argument of prematurity was rejected, Senior Counsel submitted that, in any event, the institution of disciplinary proceedings does not, of itself, constitute an interference with the Article 10 right. Whilst a sanction imposed at the end of a disciplinary process might have that effect, it is always necessary to have a process to determine whether or not there has been misconduct. The institution of a process is not, of itself, enough to give rise to a "chilling effect", though a sanction at the end of the process could potentially have that effect. The Strasbourg authorities relied upon by the petitioner were all cases where either some form of sanction had been imposed (*Steur*; *Wille*; *Kudeshkina*) or in which there was a challenge to the underlying law (*Akçam*).

[34] On the issue of justification, it was important to note that the petitioner did not challenge the legality of the underlying disciplinary rules and procedures, nor did he suggest that there could never be circumstances in which those procedures could properly be instituted in relation to an issue which potentially engaged with an issue of freedom of

expression by a police officer. It was implicit in that latter point that the petitioner conceded that there was a range of expression which could properly be the subject of the misconduct investigatory procedures as being arguably discreditable conduct. The petitioner's conduct here was "in the zone" of such conduct. The terms of Article 10(2) and the related Strasbourg jurisprudence recognised that it was potentially legitimate to restrict expression by public officials, including police officers, to ensure that the dissemination even of accurate information is carried out with "moderation and propriety" (*Kudeshkina*, at paragraph 93) and with "reserve and discretion" (*Trade Union of the Police in the Slovak Republic and others* v *Slovakia*, Application No. 11828/08 (ECtHR, 11 February 2013), at paragraphs 57, 69 and 70). The maintenance of public confidence in the police service furthers the legitimate aims of public security and the prevention of disorder or crime. Discreditable conduct is capable of undermining public confidence and thus those aims. Legitimate restriction of the Article 10 right in the case of police officers can extend to restrictions both on *what* they say and on *how* they say it, provided that such restriction is justified as being both necessary and proportionate to the legitimate aim of maintenance of public confidence in the police. The suggestion that the use by the petitioner of a GIF from a comedy film in the context of a debate on social media about the death of a man in police custody might constitute discreditable conduct was something that the respondent was, at the very least, entitled to investigate. Inquiry into that issue through the use of the 2014 Regulations was a necessary and proportionate means of maintaining public confidence. As the petitioner did not accept that he had done anything wrong, there was no other less intrusive means of achieving the respondent's legitimate aim. The logical conclusion of the petitioner's submission that the process itself is an unjustified interference with his Article 10 right is that there could never be any inquiry under the 2014 Regulations

into the issue of whether or not there had potentially been discreditable conduct by him through his use of the GIF.

[35] These same considerations were linked to the issues of rationality and to the reasons for the decision to serve the Regulation 15 notice. It was important to recognise that the only decision taken thus far was that there was a case to answer that there may have been discreditable conduct by the petitioner. A conclusion to that limited extent could not be said to be irrational. The use of the GIF was within the band of behaviour that could potentially amount to misconduct. Anyone reading the Regulation 15 notice in the context of the Regulation 14 determination would understand why that decision had been reached.

Analysis and decision

Alternative remedy

[36] The petitioner seeks to prevent further disciplinary proceedings against him, including a disciplinary meeting consequent upon the service of the Regulation 15 notice. I agree with the submission made on his behalf that it would be very odd if the Regulation 15 meeting was regarded as providing him with an effective alternative remedy such as to exclude the availability of judicial review. Having regard to the particular subject matter of this petition and the remedy sought, it cannot be said that he has failed to exhaust an effective alternative remedy.

Article 10

[37] Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

"**Freedom of expression**

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The engagement of Article 10

[38] The use of the GIF constituted "expression" for the purposes of Article 10. Neither party suggested otherwise. I accept that, in principle, the making of a formal allegation – whether in criminal proceedings or in misconduct proceedings brought by a public body which is subject to the provisions of the Convention – is capable of constituting an interference with the Article 10 right. As the Convention jurisprudence recognises, that is because of the potential "chilling effect" of such an allegation (*Akçam* v *Turkey*; *Wille* v *Liechtenstein*; *Kudeshkina* v *Russia*; *R (On the application of Miller)* v *College of Policing*; *Steur* v *Netherlands*).

[39] In this case, it is not suggested by the petitioner that any conditions or restrictions upon the exercise by him of his Article 10 right are not "prescribed by law", nor is it suggested that the 2014 Regulations or the respondent's related rules and policies are, in principle, incompatible with Article 10.

Justification

[40] The central issue in this case is, as the Dean of Faculty submitted, whether or not the respondent is able to justify the particular interference, in the circumstances of this case, as being "necessary in a democratic society" in terms of Article 10(2). Having regard to the principles described in *Ahmed*, the respondent must identify a pressing social need (or "legitimate aim"), and must also show that the interference in question is proportionate to the pursuit of that aim and supported by reasons which are relevant and sufficient.

[41] The Article 10(2) aims relied upon by the respondent in this case are "public safety" and "the prevention of disorder or crime". The respondent submits that those aims are achieved through maintenance of public confidence in the police service. For the reasons noted by Lord Bannatyne in *BC and others* v *Chief Constable of the Police Service of Scotland* [2019] CSOH 48, the issue of maintaining public confidence in the police represents the link between these two aims. As was noted in *BC*, it is essential for successful and effective policing that the public should have confidence in the police. If the public loses confidence in the police then public safety would be put at risk. The police cannot operate efficiently without such public confidence. If public confidence is lost, the police will be less able to prevent disorder or crime. That analysis was endorsed by the Inner House in *BC* (*BC and others* v *Chief Constable of the Police Service of Scotland* [2020] SLT 1021) where it was also noted (at paragraph [114]) that maintenance of these aims requires the police to be regulated by proper and efficient disciplinary procedures. Again, I did not understand any of those general principles to be contentious in this case.

[42] Whilst the Strasbourg court has recognised – at least in the case of journalists – that Article 10 protects not only the content of the expression, but the form which that expression takes (*Gaunt* v *United Kingdom*), it has also noted that it may be proportionate for states to

impose restrictions on the Article 10 right in the case of public officials, including police officers, to ensure that the right is exercised with "moderation and propriety" (*Kudeshkina* at paragraph 93) or with "reserve and discretion" (*Trade Union of the Police in the Slovak Republic and others* v *Slovakia* at paragraphs 57, 69 and 70). In the case of civil servants, national authorities enjoy a margin of appreciation in determining whether the impugned interference is proportionate to the aim (*Ahmed v United Kingdom*, at paragraph 70).

[43] It is important to recognise that the issue in this case is not whether the imposition of a disciplinary penalty or sanction is necessary and proportionate. No such penalty or sanction has been imposed on the petitioner. The disputed issue is simply whether the respondent has established that, in order to maintain public confidence in the police, it is a necessary and proportionate interference with the petitioner's Article 10 right for the petitioner to be invited to attend a disciplinary meeting pursuant to a Regulation 15 notice to consider whether or not his use of the GIF within his Tweet on 11 November 2019 at 6.17pm was misconduct consisting of conduct which discredited the police service.

[44] The petitioner's position is that on no possible view of matters is further inquiry necessary or appropriate into whether or not his use of the GIF in the Tweet of 11 November 2019 constituted discreditable conduct. Alternatively, he submits that the respondent has not provided adequate reasons for her conclusion that such further inquiry is necessary or proportionate. His arguments in relation to Article 10(2) are closely linked to his position on irrationality and reasons at common law.

[45] In my view, the decision by the respondent under Regulation 14(1) that there is a "case to answer" in relation to the allegation of discreditable conduct arising from the posting of the GIF by the petitioner cannot be said to be irrational. Her reasons for reaching that decision are clearly expressed and are neither ambiguous nor difficult to understand.

Whilst the views of members of the public who choose to engage in debate on social media could never be determinative of the issue, there were clearly some members of the public who regarded the use of the GIF by a police officer as inappropriate and offensive in the context of a discussion about a death in police custody. Quite apart from the negative comments that the Tweet received, the view of the respondent that the use of a clip from a comedy film in that context might constitute discreditable conduct was tenable and one that she was entitled to reach – at least to the standard of there being a "case to answer".

[46] That decision fell within the relevant margin of appreciation recognised by the Strasbourg jurisprudence in relation to the legitimate scope of interference with the Article 10 rights of civil servants, including police officers. In considering the issue of expression by police officers, there is a range of conduct where a case to answer of discreditable conduct may properly be found to exist. The conduct with which this petition is concerned is within that range. It is clear that in reaching the view that there was a case to answer in this case the respondent took into account the petitioner's Article 10 right. In terms of Regulation 14(2), once the respondent made a decision under Regulation 14(1) that there was a case to answer, Regulation 14(2) made the service of a Regulation 15 notice mandatory. As I have already noted, the petitioner does not challenge the compatibility of the 2014 Regulations with Article 10. In these circumstances, and for the reasons given by the respondent, service on the petitioner of a Regulation 15 notice to enable further consideration of the issue of alleged misconduct was prescribed by law and was both necessary and proportionate to the aim of maintaining public confidence in the police service.

Disposal

[47] For these reasons, I shall sustain the respondents' fifth plea-in-law, repel the petitioner's pleas-in-law and refuse the petition. I shall reserve meantime all questions as to expenses.